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POH GAIK LYE

v.

AMFRASER SECURITIES PTE LTD

B

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
MOHTARUDIN BAKI JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEAL NO: B-03(IM)-127-08-2012]
4 OCTOBER 2013

C

BANKRUPTCY: *Notice - Extension of - Validity of bankruptcy notice and substituted service order - Whether wrong party stated as judgment creditor - Whether a fatal error - Whether application for substituted service flawed - Application to amend - Whether defects remedied*

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A bankruptcy notice was issued against the appellant. The amount claimed in the bankruptcy notice was for the sum of RM21,284,527.12, being the judgment sum together with interest calculated up to six years from the date of judgment. Subsequently, the judgment creditor ('respondent') in an *ex parte* application obtained an order to extend the validity of the bankruptcy notice and also an order of substituted service of the same. The judgment debtor ('appellant') made an application before the Senior Assistant Registrar ('SAR') to set aside the extension of the bankruptcy notice and substituted service. The SAR allowed the application, but on appeal to the High Court, the bankruptcy notice was restored on the grounds, *inter alia,* that (i) the substituted service order was not defective in view of the amendment made; and (ii) the interest claimed was accurate as it was in accordance with the judgment. Hence, this appeal. In respect of the order for the extension of bankruptcy notice, the appellant contended that it suffered a fatal defect in that it showed that the claim against the appellant was from 'Citibank Berhad' and not the respondent. The respondent sought to remedy this by an application to amend the extension and substituted service order after the application to set aside, in fact some three months later. The appellant also contended that the respondent's *ex parte* application for substituted service was flawed due to the inconsistent reasons given by the respondent. In the letter of appointment for service, it stated that on two occasions of attempted service, the respondent's representative was told that the appellant was not present at the premises. In the affidavit of the process server, he stated that the premises was closed and his calls were not answered. The issues that arose for determination were (i) whether the amendment made had remedied the defect; and (ii) whether the High Court was correct in reinstating the bankruptcy notice.

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Held (allowing appeal with costs)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) When the order for extension of the bankruptcy notice containing the name 'Citibank Berhad' was made, it could not be a valid extension for the reason that 'Citibank Berhad' had no *locus* to make that application. As such, there could not be any service of the bankruptcy notice on the appellant by substituted service due to the fatal defect. (para 13)

(2) The amendment could not revive something which never had a life in the first place. This was not a pleading so to speak and thus, the amendment could not relate back. As such, the SAR was correct to set aside the bankruptcy notice. (para 14)

(3) The appellant had already filed an application to set aside the bankruptcy notice when the respondent filed the *ex parte* application. There was no reason why the appellant was not informed of the application which could not be treated as uncontested. As such, the principle of natural justice must be applied with full force. Accordingly, the bankruptcy notice was defective and could not be used to premise the respondent's bankruptcy action against the appellant. (para 15)

(4) In an *ex parte* application, applicants must make full, frank and accurate disclosure to the court. Bankruptcy proceedings against anyone was a drastic measure and a bankrupt's life in many respect was shackled by many chains and was under the supervision by the Official Receiver during his bankruptcy life. The courts could not accept any cavalier approach, a strict approach must be the order of the day. (paras 18 & 19)

(5) The sealed order merely stated 13% interest and not 13% interest per annum or month as was done in all orders. Therefore, the court could not determine the basis of the interest charged. The primary document to premise a bankruptcy notice was the judgment and when that was not clear, that bankruptcy notice was the least suspect. Hence, the bankruptcy notice did not confirm to the terms of the sealed order of the judgment. (para 20)

Case(s) referred to:
Re Aris Massod Ex P Uol Factoring Sdn Bhd [1998] 4 CLJ Supp 446 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(2)(ii)

For the appellant - Ho Kok Yew; M/s Ranjit Singh & Co
For the respondent - Sathya Kumaroas; M/s Shearn Delamore & Co

[Appeal from High Court, Shah Alam; Civil Appeal No: S29-7063-2008]

Reported by Sandra Gabriel

JUDGMENT

David Wong Dak Wah JCA:

Introduction

[1] This matter emanates from the decision of the learned senior assistant registrar who had on 15 June 2011 allowed an application by the appellant here to set aside a bankruptcy notice issued by the respondent.

[2] That led to an appeal by the respondent to the High Court where the learned judge on 25 July 2012 allowed the appeal and restored the bankruptcy notice. This appeal is the result of decision of the learned judge.

[3] We heard the appeal and after due consideration to respective submissions we allowed the appeal and now give our reasons.

Background Facts

[4] The respondent had on 10 July 1998 obtained a summary judgment in the sum of RM11,482,024.19 against the appellant. A bankruptcy notice was issued on 18 December 2008 premised on the summary judgment. The amount claimed in the bankruptcy notice was for the sum of RM21,284,527.12, being the judgment sum together with interest calculated up to six years from the date of judgment dated 9 July 2004.

[5] On 21 April 2009, the respondent in an *ex parte* application obtained an order to extend the validity of the bankruptcy notice from 18 March 2009 to 17 March 2010 and also an order of substituted service of the same.

[6] The appellant on 16 December 2009 made an application before the learned senior assistant registrar to set aside the extension of the bankruptcy notice and substituted service of the same. As stated earlier the learned senior assistant registrar on 15 June 2011 allowed the application but that decision was overturned by the High Court on 25 July 2012.

[7] The respondent had on 8 February 2010 applied to amend the extension and the substituted service order as the bankruptcy notice had contained the name 'Citibank Berhad' as the applicant rather than the respondent's name. That application was granted by the court on 10 March 2010.

High Court Decision

[8] As rightly pointed out by the learned counsel for the appellant, the learned judge reinstated the bankruptcy notice on four grounds and they are as follows:

(i) The substituted service order is not defective in view of the amendment made on 18 March 2010;

(ii) Leave to issue the bankruptcy notice was not necessary;

(iii) The sum claimed is correct as the appellant failed to challenge it under s. 3(2)(ii) of the Bankruptcy Act 1967; and

(iv) Interest claimed is accurate as it was in accordance to the judgment.

Our Grounds Of Decision

[9] It is our considered view that this appeal can be dispensed with by deliberating on the validity of the substituted service of the bankruptcy notice and the bankruptcy notice itself.

Bankruptcy Notice

[10] It is undisputed that order for extension and substituted service contained the name 'Citibank Berhad' when it was first issued on 21 April 2009. As pointed out earlier, the appellant on 16 December 2009 applied to set aside the bankruptcy notice and substituted service of the same.

[11] In respect of the order for the extension of bankruptcy notice, it was contended that it suffered a fatal defect in that it showed that the claim against the appellant was from 'Citibank Berhad' and not the respondent. The respondent sought to remedy this by an application to amend the extension and substituted service order after they were found out so to speak by the application to set aside.

[12] That application to amend was made after the application to set aside, in fact some three months later. The issue which confronts us is whether the amendment made had remedied the just mentioned defect.

[13] It is our view that when the order for extension of the bankruptcy notice containing the name 'Citibank Berhad' was made, it cannot by any stretch of imagination be a valid extension for the simple reason that 'Citibank Berhad' had no *locus* to make that application. Further when that bankruptcy notice was served by publication by virtue of the substituted service order, it also cannot be any service of a bankruptcy notice on the appellant as it suffered from a fatal defect as mentioned above. In short there was no service whatsoever.

[14] The amendment order on 18 March 2010 with respect cannot revive something which never had a life in the first place. This is not a pleading so to speak and thus that amendment cannot relate back. Furthermore at the time of application to set aside was on 16 December 2009, the learned senior assistant registrar can only deal with the facts as at that date and at that date the bankruptcy notice suffered a fatal defect. Hence the learned senior assistant registrar was perfectly correct to set aside the bankruptcy notice.

[15] Another disturbing factor in this appeal is the mode of application for amendment of the bankruptcy notice and substituted service of the same. The respondent had used an *ex parte* application. At that point in time, the appellant had already filed an application to set aside the bankruptcy notice and we see no reason whatsoever why the appellant or his solicitors was not informed of that application which cannot be treated as an uncontested one. As such the principle of natural justice in our view must be applied with full force in that circumstance.

[16] Accordingly we find that the bankruptcy notice is defective and cannot be used to premise the respondent's bankruptcy action against the appellant.

Substituted Service Application

[17] Learned counsel for the appellant had also relied on the inconsistent reasons given by the respondent for the *ex parte* application for substituted service to contend that the application for substituted service is flawed. In the letter of appointment for service, it stated that on two occasions of attempted service, the respondent's representative was told that the appellant was not present at the premises. In the affidavit of the process server, he stated that the premises were closed and his calls were not answered. Learned counsel for the respondent brushed this argument aside by saying they are petty arguments.

[18] With respect we are not able to agree with learned counsel for the simple reason that when any application is made to the courts especially an *ex parte* basis and in this case counsel was dispensed with attendance, applicants must make full, frank and accurate disclosure to

the court. They are duty bound to do so. The courts expect no less. They cannot rely on grounds which are not consistent. Practice Note No. 1 referred to in the case of *Re Aris Massod Ex P Uol Factoring Sdn Bhd* [1998] 4 CLJ Supp 446 by Steve Shim J (as he then was) remains relevant today in respect of any application for substituted service of any cause document. Both practitioners and officers of the court should be mindful of what is stated in the just mentioned practice direction though made in 1968.

[19] Further it must be remembered that bankruptcy proceedings against anyone is a drastic measure with great and damaging ramifications to one's livelihood. A bankrupt's life in many respect is shackled by many chains and is under the supervision by the Official Receiver during his bankruptcy life. As such, the courts cannot accept any cavalier approach, a strict approach must be the order of the day.

Sealed Order Of The Judgment

[20] Another reason for our decision is the sealed order which in our view is incomplete and unsatisfactory to say the least. It is trite law that bankruptcy notice must be based on the sealed order of the judgment. In this case, it is undisputed that the sealed order merely states '13% interest' and not '13% interest per annum or month' as is done in all orders. So on the face of that order, the court cannot say that on what basis was interests charged, is it 13% per month or per annum? One must not forget that the primary document to premise a bankruptcy notice is the judgment and when that is not clear, that bankruptcy notice is to say the least suspect. Hence we have no alternative but to hold that the bankruptcy notice did not conform to the terms of the sealed order of the judgment.

Conclusion

[21] For reasons stated above, we allowed the appeal with costs of RM5,000 to the appellant and ordered that the deposit to be refunded to the appellant. Accordingly the decision of the High Court is set aside and the decision of the learned senior assistant registrar is reinstated.